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Summary record of the 718th meeting

Held at the Vienna International Centre, Vienna, on Thursday, 28 June 2001, at 2 p.m.

Chairman: Mr. Pérez-Nieto Castro ..... (Mexico)

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The meeting was called to order at 2.15 p.m.

Draft Convention on Assignment of Receivables in International Trade (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-5 and A/CN.9/491 and Add.1)

Article 4 (*continued*)

Paragraph 3 (*continued*)

1. **Ms. Gavrilescu** (Romania) said that her delegation could support the reformulated text of paragraph 3 (a) proposed by the United States representative at the previous meeting. It was important to specify that the word "land" appearing in the proposed text included both the land and the constructions on it.

2. **Ms. McMillan** (United Kingdom) said that her delegation was not clear as to what policy had been adopted at the previous session. According to the Irish and Australian observer delegations, it had been decided that all receivables arising from transactions in land were to be excluded from the scope of the draft Convention. As the United Kingdom delegation understood it, however, the Commission had agreed to try to provide for the exclusion of assignments that could enable a non-national to purchase land and buildings in a State where that was prohibited by national land law; for an exclusion based on what the United States representative had described at the previous meeting; and for an exclusion aimed at preserving the priority secured for lenders by registration when lending against the security of land. If that narrower policy was in fact the one decided upon, her delegation could propose text in an attempt to meet the purpose.

3. Whatever form the exclusions ultimately took, her delegation would not be happy with the term "real estate", which could be taken to refer to buildings and to exclude the land on which they stood, and which was an expression not used in United Kingdom land law. It had no objection to "land" being defined so as to include buildings, in line with the definition of land in European Union legislation.

4. **Mr. Chan** (Singapore) endorsed the views expressed by the United Kingdom representative. The United States proposal differed fundamentally from the policy decision reached following considerable discussion in the Commission on how receivables arising from real estate transactions should be dealt with in the draft Convention. That decision had been a compromise between several competing interests. In his view, the issue was too complex to revisit at the present stage, and the carefully thought-out text now before the Commission was probably the best that could be achieved.

5. **Mr. Doyle** (Observer for Ireland) said he agreed with much of what the two previous speakers had said. He noted the suggestion by the Secretariat, in paragraph 32 of document A/CN.9/491, that the issue might have to be looked at again. However, if there was consensus on the current text, he would be happy to leave it as it stood.

6. **Mr. Winship** (United States of America) said that his delegation had not intended to reverse any policy. Its proposal had been made with the aim of ensuring that major national real estate markets were not disrupted, since United States property law differed from state to state and there would be a problem in having a generally applicable rule. His delegation would be prepared to withdraw its proposal on the understanding that the draft Convention provided for declarations to be made by States that so wished. That would require some adjustment to the language of article 4, paragraph 4, and of article 41, with the inclusion of a reference to the location of the land or the real estate. He wished to stress that his delegation was not seeking a very broad authority, but was willing to narrow the scope of the possible declarations.

7. **Mr. Morán Bovio** (Spain) thanked the United States delegation for withdrawing its proposal. Careful thought should be given to the revised wording to be proposed for article 4, paragraph 4, and article 41.

8. **Ms. McMillan** (United Kingdom) said that, in its current formulation, paragraph 3 (a) created the false impression that it was a substantive provision of land law and that the draft Convention was attempting to override national land law. Her delegation wished to propose replacing subparagraphs (a) and (b) of paragraph 3 with the words: "Where the assignment of a receivable operates so as to confer an interest in land on an assignee, nothing in this Convention shall displace or override the application to that interest of the national law of the State in which the land is located." That text attempted to convey the idea that the Convention did not override land law, any more than it overrode preferential rights in insolvency. If the text

was unacceptable or its discussion might delay the Commission's deliberations, she would simply request that the expression "property rights in real estate" be avoided. "Interest in land" would be preferable.

9. **Mr. Zanker** (Observer for Australia) said that the United Kingdom proposal was more felicitous than the current text of paragraph 3 (a). He wondered, however, whether the phrase "interest in real property", which he had already proposed, might also be acceptable from the standpoint of United Kingdom law.

10. **Mr. Winship** (United States of America) said his delegation did not believe that the language proposed by the United Kingdom delegation satisfactorily dealt with the problem addressed by paragraph 3 (a). It wished to suggest that the text should remain unchanged and that a declaration procedure should be used if any clarification was required for a particular jurisdiction, given the sacrosanct nature of real property law. That might be the most appropriate way of accommodating the needs of national markets and their internationalization. The question of deciding on a suitable phrase to convey real estate interests should be left to the drafting group.

11. **The Chairman** recalled that there had been a proposal by the delegation of Japan to amend the words "make lawful", in subparagraph (b), to read "give legal effect to".

12. **Ms. Gavrilescu** (Romania) questioned the need for further debate on paragraph 3: most delegations favoured retaining the text of subparagraph (a); subparagraph (b) had given rise to no objections; and the United Kingdom proposal could be understood as involving a change of wording but not of policy.

13. **Mr. Bazinas** (Secretariat) said that, while subparagraph (a) dealt with the conflict of priority between an assignee under the Convention and a person with property rights in land who had a right in the receivable, subparagraph (b) was intended to address a situation where an assigned receivable was secured by a mortgage, which, under article 12, conferred a right in land; and to ensure that, if the law did not allow the acquisition of that right, the Convention would not permit it. The United Kingdom proposal, which would replace both subparagraphs (a) and (b), attempted to reflect the same meaning in a more general way.

14. **Mr. Stoufflet** (France) said his delegation felt that the formulation proposed by the United Kingdom delegation was clearer and more direct. The word "land" in the English version was acceptable, since it covered both the land and the constructions on it. An equivalent term in French could no doubt be found.

15. **Ms. McMillan** (United Kingdom) said that if the proposed text presented problems, her delegation would be happy to withdraw the proposal, to retain subparagraph (b) with the reference to real estate redrafted, and to rework subparagraph (a).

16. **Mr. Winship** (United States of America) said his delegation wished to suggest that subparagraph (b) should be retained and that the United Kingdom delegation should consult with other delegations with a view to reformulating subparagraph (a).

17. **Mr. Joko Smart** (Sierra Leone) said he could wholeheartedly support the United Kingdom proposal, which, in his view, covered both subparagraph (a) and subparagraph (b). Perhaps the word "realty" might be used in place of "land".

18. **Mr. Doyle** (Observer for Ireland) said that, while he welcomed the United Kingdom proposal, he feared that it could lead to a lengthy discussion on whether its wording actually carried the same meaning as current subparagraphs 3 (a) and (b). He was in favour of leaving the two subparagraphs as they stood, subject to rewording of the term "real estate" by the drafting group.

19. **Ms. Straganz** (Austria) said that her delegation supported the United Kingdom proposal, which was more readily comprehensible than the existing formulation and which appeared to cover both subparagraph (a) and subparagraph (b).

20. **Ms. Walsh** (Canada) said that her delegation shared the reservations expressed by the observer for Ireland. The United Kingdom proposal addressed a situation where the assignment of a receivable operated to confer an interest in land, while both the original text and the text proposed by the United States addressed the converse situation, where a property right to land conferred a right to a receivable. Furthermore, it was not clear what law was applicable for determining whether the assignment of a receivable operated to confer an interest in land. Her delegation preferred to adopt the United States proposal, subject

to clarification by the drafting group of the reference to real estate.

21. **The Chairman** said it was clear that the United Kingdom proposal to merge the two subparagraphs of paragraph 3 into a new paragraph did not command sufficient support.

Article 4, paragraph 4, and article 41

22. **Ms. Piaggi de Vanossi** (Observer for Argentina) said that, in its present formulation, paragraph 4 created a possible conflict with the draft Convention on International Interests in Mobile Equipment and its protocols, prepared by the International Civil Aviation Organization in cooperation with the International Institute for the Unification of Private Law (UNIDROIT). Since the diplomatic conference at which the UNIDROIT draft Convention and protocols were to be adopted was now due to take place at the end of October 2001, a decision should be taken by the Commission beforehand concerning the relationship between the draft Convention and the UNIDROIT draft Convention and its protocols.

23. **The Chairman** said that, since the Secretary General of UNIDROIT would be present the following day, it would be advisable to postpone the discussion of the issue raised by the observer for Argentina until a subsequent meeting.

24. **Mr. Winship** (United States of America) said that his delegation believed that article 41 must be retained. It provided the necessary flexibility, given that not all future financing practices could be anticipated. His delegation was, however, willing to accept some limitation on the right to make declarations linked to the policies represented by the exclusions in article 4. In particular, the areas covered by paragraphs 3 (a), 2 (d) and 2 (f) were ones where there was the likelihood of a need to clarify the scope of the Convention. He also wished to draw attention to his Government's comments in document A/CN.9/490 and specifically to the need for article 4 to exclude some existing practices and to specify when an assignor or a debtor must be located in a contracting State.

25. **Ms. Sabo** (Canada), after endorsing the remarks on draft article 41 made by the representative of Austria at the 715th meeting, said her delegation felt that article 4, paragraph 4, and article 41 could thwart any attempts at harmonization and should be deleted. The argument that those provisions would give the Convention some flexibility to deal with future developments in the area of assignments was far outweighed by the detrimental effect of allowing contracting States such broad scope unilaterally and unpredictably to reduce the application of the Convention. However, her delegation might be willing to agree to the retention of those provisions if the permitted declarations could be strictly limited in scope, clearly described and confined to specific areas only.

26. **Mr. Berner** (Observer for the Association of the Bar of the City of New York) said that, in his view, the deletion of article 41 would effectively render the Convention a dead letter. The financial markets were a dynamic, worldwide industry whose innovations could not be predicted. It was important for States to have the flexibility that would allow their lenders and borrowers to develop relationships that could not be conceived of at the present time. Any changes that might be made to article 4, paragraph 4, and article 41 should allow for the broadest possible scope. The aims of keeping interest rates low and increasing the amount of credit in the world could best be achieved by means of innovations for which it was not currently possible to legislate.

27. **Mr. Whiteley** (United Kingdom) said that his delegation had always opposed the idea embodied in article 4, paragraph 4, and in article 41, and therefore wished to align itself with the delegations of Austria and Canada. If paragraph 4 was adopted, perhaps it should be amended so that its provisions also covered a State in which land was situated.

28. **Ms. Piaggi de Vanossi** (Observer for Argentina) said that her delegation wished to propose the deletion of paragraph 4 and the inclusion of language on the lines suggested by UNIDROIT, as set out on the last page of document A/CN.9/490.

29. **Mr. Stoufflet** (France) said that, while his delegation was swayed by the United States proposal to limit the possibility of exclusion to cases specifically listed in the draft Convention, the French Government would endeavour to avoid making use of that option, because of its adverse effect on unification. However, if the text did not provide for consumer protection to be guaranteed in all cases, his delegation might insist on the possibility of excluding the application of the Convention to the assignment of consumer receivables.

When the Commission came to consider draft article 17, his delegation would propose additional language in that regard.

30. **Mr. Doyle** (Observer for Ireland) said that article 4, paragraph 4, and especially article 41 had the capacity to unravel the Convention. His preference thus was for their deletion. If they were to be retained, he would be in favour of limiting those provisions in some way.

31. **Mr. Huang Feng** (China) said that draft article 41 should be retained, as new forms of assignment of receivables were bound to develop. Article 47 allowed for the possibility of amendment if one third of the Contracting States so requested. Since the Convention would enter into force after five ratifications had been deposited, in practical terms that meant that the Convention could be amended at the initiative of just two States. It was therefore very important to retain article 41.

32. **Ms. Walsh** (Canada) asked for clarification of the United States proposal to limit the scope of the declarations possible under article 4, paragraph 4, and under article 41. Was it proposed to cover situations analogous to those addressed in paragraphs 2 (d) and (f) and 3 (a) of article 4? Would the new wording allow for the exclusion of existing categories of receivables, or would it be restricted to future products?

33. **Mr. Winship** (United States of America) said that the proposal was merely a suggestion for a compromise between those who felt strongly that there was a need for uniformity and harmonization and those who feared that the Convention would not be acceptable unless it was flexible. His delegation was not yet able to propose specific language for article 4, paragraph 4, and article 41, but would be pleased to consult with others to that end.

34. **Mr. Zanker** (Observer for Australia) said he was inclined to support the deletion of article 4, paragraph 4, and of article 41. He was, however, prepared to listen to any proposals to restrict their scope, although it was not very clear how that could be done.

35. **Mr. Meena** (India) said that article 4, paragraph 4, reflected a flexible approach which would make the Convention more acceptable, and that his delegation was therefore in favour of its retention, particularly as it would be very difficult to draw up an exhaustive list of assignments that could be subject to declaration by States.

36. **Mr. Medin** (Sweden) said that his delegation would prefer to see article 4, paragraph 4, and article 41 deleted. However, many delegations clearly felt that article 41 must be retained so as to allow for some flexibility. It was possible, however, that, as currently drafted, article 41 went too far in that direction.

37. **Mr. Al-Nasser** (Observer for Saudi Arabia) said that his delegation supported the deletion of paragraph 4 and the retention of article 41. New products might be developed, and the possibility of issuing a declaration under article 41 would provide the instrument with the flexibility it would require.

38. **Mr. Charassangsomboon** (Thailand) supported the retention of article 4, paragraph 4, and article 41, and expressed concern about the vulnerability of small countries with open economies to speculative transactions. In any event, many countries would be reluctant to make a declaration, and would do so only as a last resort.

The meeting was suspended at 3.45 p.m. and resumed at 4.10 p.m.

39. **Ms. Ladová** (Observer for the Czech Republic) said that her delegation supported the retention of article 4, paragraph 4, as it provided for flexibility in response to unforeseeable future developments and provided better protection for consumers.

40. **Mr. Markus** (Observer for Switzerland) said that he supported the deletion of article 4, paragraph 4, and of article 41. However, his delegation could also accept a compromise, provided a clear and limited list of possible exclusions could be drawn up. To fail to do so would be to embark on a dangerous path, for any declaration made by a State under article 41 as currently worded would trigger reciprocity mechanisms under the Vienna Convention on the Law of Treaties, thereby rendering the system still more complicated. As he understood it, the United States proposal would relate only to the assignment of certain categories of receivables, and not to certain types of assignments, as currently provided for in article 41. The examples cited by the representative of Austria, to which the representative of Canada had alluded, had demonstrated that such exclusions would lead nowhere.

41. **Mr. Franken** (Germany) said that his delegation supported in principle the proposal put forward by the delegation of the United States, although more detailed analysis was required to define precisely what items should be included in article 4, paragraph 4.

42. **Mr. Smith** (United States of America) said that his delegation now had a specific proposal for draft article 41. The proposal was to address two categories of assignments of receivables. The first related to existing practices, the second to practices that might arise in the future, but that the Commission could not yet exclude because it had no way of knowing what form they would take.

43. Included in the first category were, first, assignments of receivables from the use or occupancy of land or buildings. While for many delegations such assignments raised no particular problems, they were problematic for the United States. If article 4, paragraph 3 (a), was retained in its present wording, the United States would have to consider the assignment of real estate rents for exclusion by declaration under article 41. A second area, that of negotiable instruments, was still under negotiation. If no consensus was reached, the United States would have to consider also placing assignments of receivables evidenced by a writing that was transferred by delivery, book entry or control of electronic records on that list.

44. With regard to future practices which could not be foreseen, the Convention should exclude, first, assignments of receivables arising in transactions in securities or capital markets, so as to deal with the types of exclusions already covered in article 4, paragraph 2, but in a more general way. That exclusion should have no impact upon normal commercial or trade receivables. Secondly, the Convention should exclude assignments of receivables arising from payment or clearance and settlement systems. It already contained a similar exclusion relating to inter-bank payment systems, but new systems might be developed by participants other than banks, enabling the parties to clear trade payments among themselves.

45. It was certainly not the intention of the United States delegation to enable States to opt out of all the provisions of the Convention under article 41. It should, however, be possible to invoke article 41 in narrow, well-defined areas where exclusion would be consistent with the exclusions in article 4, paragraph 2.

46. **Mr. Morán Bovio** (Spain) said that his delegation welcomed the proposal put forward by the representative of the United States, although it had some reservations about the somewhat broad character of the exclusion relating to assignments of receivables evidenced by a writing transferred by delivery, book entry or control of electronic records. The text would need to be drafted so as to ensure that no further declarations would be possible.

47. **Mr. Berner** (Observer for the Association of the Bar of the City of New York) said that the Mexican State oil company, PEMEX, had devised a form of trilateral use of its trade receivables, whereby they were assigned to a European entity with the aim of financing the import of manufactured goods to Mexico. Such a system, which could be of great economic benefit to developing countries with natural resources, clearly fell outside the scope of the United States proposal. It would not be desirable for the Convention to undermine the development of such systems.

48. **Ms. Brelier** (France) was not sure that her delegation could support the drawing up of a restrictive list for article 41. In any case, the Convention's provisions would first have to be reviewed as a whole, an exercise that might take several days.

49. **The Chairman** suggested that the United States delegation should submit its proposal in writing for consideration the following day.

50. **Ms. Sabo** (Canada) said that it was not clear at first glance how the proposals relating to future practices, concerning assignments of receivables arising in transactions in securities or capital markets and settlement systems, differed from the provisions already contained in article 4, paragraph 2. While her delegation continued to favour the deletion of article 4, paragraph 4, and article 41, it looked forward to seeing the proposal of the United States in written form.

51. **The Chairman** said he took it that the Commission wished to suspend its consideration of article 4, paragraph 4, and of article 41 until a written proposal became available.

52. *It was so agreed.*

53. **Mr. Bazinas** (Secretariat) said it was his understanding that the United States proposal concerning capital markets would be very general, seeking to capture whatever did not fall under article 4,

paragraph 2. As for payment or clearance and settlement systems, the proposal was to address systems between entities other than banks, which were covered by article 4, paragraph 2 (d). The other two areas on the list, namely, receivables in negotiable and other instruments and land receivables, were to be included only if discussions with a view to including them in article 4 proved fruitless. With respect to the former, a joint proposal for article 4, paragraphs 1 and 2, would be submitted by France and the United States the following day.

Article 5

54. **Ms. Brelier** (France) said she recalled that during its consideration of article 24, the Commission had decided to include a definition of "competing claimants" in article 5.

55. **Mr. Bazinas** (Secretariat) said that the issue of competing claimants was addressed in the definition of "priority" in new article 5 (g), the text of which had been circulated.

56. **Mr. Joko Smart** (Sierra Leone) asked why the terms "assignment" and "receivables" were defined in article 2, rather than under "definitions", in article 5.

57. **Mr. Franken** (Germany) said that since the Commission's consideration of the definition of location in article 5 (h) at its previous session, widespread concern had been voiced about the coverage of branch offices of banks and other financial institutions. The best solution would perhaps be for the branches of banks to be deemed to be separate entities. The applicable law would thus be the law of the country where the branch was located, not that of the country where the central administration of the bank was located.

58. **Mr. Stoufflet** (France) and **Mr. Huang Feng** (China) supported the proposal put forward by the representative of Germany.

59. **Mr. Whiteley** (United Kingdom) said that although at the previous session his delegation had supported the idea of a separate rule for bank branches, he personally had since reconsidered his position. While in many instances it was desirable to deem bank branches to be separate entities, that would not always be the case. For example, the capital adequacy of a bank branch would be calculated according to the rules of the jurisdiction of incorporation, not those of the host State. In his view, the location rule in the Convention as currently drafted was the appropriate one, as the scope of the Convention was limited by the definition of "competing claimant".

60. One of the main legal problems that transfers of receivables posed was that they created divided ownership. The relationship between the debtor and the creditor was changed by the transfer or assignment, so that the debtor must now deal with an assignee. That created problems for the legal system, as an effort had to be made to ensure that the transfer took place as transparently as possible. The debtor should know with whom it was legally bound to treat, and any other party regarding the receivable as a property right should be able to identify its owner. However, assignment also created problems for creditors who dealt with assignors: while the receivable apparently belonged to the assignor, it was not in fact a part of the assignor's estate, but belonged to the assignee. Robert Maxwell had exploited that state of affairs to increase the amount of money lent to him on the basis of assets he did not in fact own. That phenomenon was known as false wealth. The Convention could in a sense be characterized as an instrument for the mutual recognition of false wealth requirements, on the basis of the assignor's location. Where a receivable was assigned by a bank branch, the appropriate place to look for perfection in respect of false wealth requirements might still be the jurisdiction of incorporation of the bank.

61. In the United Kingdom, there were requirements for registration of charges. If a United Kingdom bank made an assignment by way of security, it would be subject to registration in relation to all assets of the company, whether they were located in the United Kingdom or overseas. There were also registration requirements for foreign companies with a place of business in the United Kingdom, in relation to their assets in the United Kingdom. Lastly, the courts had established a notification procedure, known as the Slavenburg procedure, which applied to foreign companies with assets in the United Kingdom that did not have a place of business there. In such cases, a letter must be sent to Companies House to register the charge, and a letter must be received in return, stating that the charge was not registerable. If the procedure was not carried out, there would be no guarantee of priority, should the charge be found to be registerable.

62. If that procedure were applied to the location rules currently contained in article 5, a United Kingdom bank assigning a receivable by way of security would seek to perfect that assignment through registration at Companies House. However, an assignment made by a foreign bank's branch in the United Kingdom would not give rise to a registerable charge in the United Kingdom if the Convention applied. The current United Kingdom law would thus have to be modified.

63. If a foreign branch of a United Kingdom bank were to assign a receivable under the rules proposed by the representative of Germany, the question would arise as to whether registration should take place in the United Kingdom or in the jurisdiction of the branch which had made the assignment. It could be foreseen that the same type of problems might then arise as with the Slavenburg registrations: there would be uncertainty as to whether it was the branch, or the head office that acted as the assignor. That could entail a double perfection requirement. For those reasons, the text should not be amended.

Election of officers (*continued*)

64. **Mr. Franken** (Germany), speaking on behalf of the Group of Western European and other States, nominated Mr. Morán Bovio (Spain) for one of the posts of Vice-Chairman.

65. **Mr. Adensamer** (Austria) seconded the nomination.

66. *Mr. Morán Bovio (Spain) was elected Vice-Chairman by acclamation.*

The meeting rose at 5.10 p.m.